APPENDIX

THE OPINION BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7909

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORPORATION and PARSONS & WHITTEMORE, INC.,
Plaintiffs-Appellants,

versus

YEARGIN CONSTRUCTION COMPANY, INC.,
Defendant-Appellee.

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YEARGIN CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellee,

versus

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORPORATION and PARSONS & WHITTEMORE, INC.,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

(August 5, 1982)

Before TUTTLE, HENDERSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Appellant Parsons & Whittemore Alabama Machinery and Services Corporation (P&W) sought in the district court the vacation of an arbitration award for $5,300,000 in favor of appellee Yeargin Construction Co. (Yeargin). The district court denied appellant's request and confirmed the award. P&W asserts it was denied a fair hearing before the arbitrators in violation of due process and 9 U.S.C. § 10. We affirm.

Facts

In May 1975, P&W sought bids from contractors for construction of a $280,000,000 pulp mill on the Alabama River near Monroeville, Alabama. P&W, acting as its own prime contractor, contracted directly for various types of work to be performed. Negotiations between P&W and potential contractors extended for over a year, during which time changes were made in the scope of the work. The mill was to be built on what is known in the construction trade as the "fast track" method (i.e., the drawings for the project were not complete at the time construction commenced but were to be developed during construction a step ahead of the actual work). In the absence of complete drawings for the project, contractors, including Yeargin, were provided with conceptual drawings or "flow sheets" to assist them in computing their bids.

Yeargin and P&W signed a contract for the mechanical work in December 1976, and Yeargin began its work in 1977. The contract called for an estimated cost of $2 million and contained provisions that provided for dispute resolution by arbitration in lieu of litigation. P&W terminated Yeargin's contract in October 1978 (Yeargin had performed approximately 80%) and completed the mechanical work itself.

Within a week of termination, Yeargin sued P&W in the Middle District of Alabama and filed with the American Arbitration Association a demand for arbitration of its breach of contract claim. P&W also filed a request for arbitration of all issues, including a counterclaim for the costs of completion, and asked the district court to stay the litigation pending arbitration. The court declined to stay proceedings pending arbitration; its action was affirmed, *Yeargin Construction Co. v. Parsons & Whittemore Alabama Machinery and Services Corp.*, 609 F.2d 829 (5th Cir. 1980); and discovery was permitted pending the appointment of arbitrators. The parties nominated arbitrators who were appointed in May 1979. The arbitration panel, chiefly through its chairman, attorney Poppleton, conducted pretrial conferences, hearings, and supervised continued discovery. The panel conducted an arbitration hearing of nine days which produced a transcript of 2,756 pages of testimony, additional deposition testimony, and 179 exhibits. The arbitration panel also received prehearing, post-hearing and reply briefs from both parties and heard oral argument. On November 20, 1979, the panel entered an award in favor of Yeargin in the amount of $5,300,000 with interest to run from that date at the rate of 6% per annum.

On November 24, 1979, P&W filed in the Northern District of Alabama an application to vacate the award. Yeargin cross-applied for confirmation of the award. On November 27, 1979, Yeargin also filed in the Montgomery action an application for confirmation of the award and a motion for judgment on it. That district court transferred the Montgomery action to the Northern District of Alabama, where it was consolidated with P&W's action and assigned to Judge Pointer.

Judge Pointer permitted discovery of the three arbitrators and a representative of the Association, India Johnson. He then conducted a three-day hearing, considered four pretrial depositions with numerous documents introduced in connection with them (adding 1,000 pages to the ballooning record), the entire transcript of the proceedings before the arbitrators, and additional documents and other materials which he noted. At the conclusion of this hearing, Judge Pointer made oral findings and conclusions and on August 27, 1980 entered judgment in favor of Yeargin and against P&W, confirming the arbitral award. Thereafter, on September 29, 1980, after oral argument, Judge Pointer denied P&W's motion for a new trial.

Scope of Review: Below and Here

The scope of judicial review of arbitration awards is limited. *Boise Cascade v. United Steelworkers,* 588 F.2d 127, 128 (5th Cir. 1979). An arbitration panel may make an award "without explanation of their reasons and without a complete record of their proceedings. . . ." *Wilko v. Swan,* 346 U.S. 427, 436, 74 S.Ct. 182, 187 (1953). Review is limited to consideration of the statutory grounds for vacation unless the award is "without foundation in reason or fact." 588 F.2d at 129. Congress has provided four bases for vacation:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any

other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

P&W sought vacation relying, specifically and by implication, on three of the grounds provided by Congress: (a), (b), and (c) above. The district court denied that relief. We examine his conclusions to ensure that his factual findings are not clearly erroneous and his legal findings are correct with respect to these three grounds. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Our review reveals that some of appellant's arguments fail because they are not based on the version of the facts found by the district court. We conclude that his findings are not clearly erroneous. The remaining arguments fail because appellant is unable to discredit the district court's legal conclusions.

I. *Failure of the Panel and Association to Follow Its Own Rules*

P&W argues that repeated violation of the Association rules and procedures operated to their prejudice and thus denied them a fair hearing and, implicitly, due process.

1. *Were Arbitrators Informed as to the Length of Time Necessary?*

Appellant notes that the Commercial Arbitration Manual provides:

Before contacting any arbitrator for the purpose of offering appointment in a given case, you *must* obtain

> information from the parties concerning their estimate as to the amount of time the arbitration will take. This is *vital* information which must be given to prospective arbitrators to assist them in deciding whether to accept the appointment. Even though it might make [it] easier at first in gaining acceptance of appointment not to mention anticipated hearing time, to do so would be unfair to the arbitrator who is contributing his or her time and abilities and could only damage the reputation of the Association.

Section 12.10, Commercial Manual (emphasis in original).

P&W asserts that "[t]hree persons who agreed to serve thus accepted the assignment with little or no knowledge of the complexity of the issues they would be asked to consider; of the sustantial monetary amounts at issue; or, most critically, of the expected length of the evidence." Appellant's Brief at 5. P&W indicates that the potential arbitrators were only told that the case was "large." The record reflects that the arbitrators were not told how long it would take to hear the case.

Nonetheless, the record does reflect that the potential arbitrators were told that this was a large multimillion dollar case and that "a large construction dispute needs a strong panel to keep arbitration from getting out of hand." Association representative Johnson testified that it is difficult to determine how long a hearing will take until close to the scheduled date.

Crucially, the trial judge found that the arbitrators would have been willing to spend more time on the case if that would have been necessary. This finding is clearly supported by the record. Mr. Poppleton testified that it would have made no difference to him if the hearing took 50 days. Mr. Morton was willing "to give

whatever . . . time" was requested. Arbitrator Barge is the only one who complained that his crowded schedule limited his availability. The parties nominated the arbitrators in the first instance. The nomination process requires that the parties balance negative and positive features of prospective arbitrators. Persons experienced in the area to be arbitrated are desirable as arbitrators but are likely to have extensive demands on their time. Our review of the record does not indicate that the busy lives of the arbitrators adversely impacted on the parties. As to this assertion of a rule violation, we find no factual support. Further, as will later be discussed, we concur with the district court that P&W had sufficient time in which to present its case under the guidelines promulgated by the arbitrators.

2. *Recusal Motion: Creating Evident Bias on the Part of the Panel?*

Displeased by several panel rulings in the summer of 1979, appellant moved to recuse or disqualify the panel. The motion was submitted in accordance with Association rules to the arbitration association. Appellant points out that arbitration rules require that the Association determine whether the arbitrator should be disqualified. Instead, the motion was referred to the arbitrators for decision.

The district judge held that the referral directly to the board members was appropriate under the circumstances. Canon 2 of the Code of Ethics for Commercial Arbitrators *permits* arbitrators to consider requests for their withdrawal. The bases for the motion were rulings by the arbitrators which caused P&W to believe they were prejudiced. The Association was uninformed with respect to the merits of these rulings. Because the motions

were submitted within two weeks of the scheduled hearing, referral to the panel was necessary in order to allow consideration of the motions before the scheduled hearing date.

The thrust of P&W's argument is that the panel members would be prejudiced by the knowledge that P&W had challenged their impartiality. We are urged "that among the situations in which the probability of bias in the decisionmaker is too high to be *constitutionally* tolerable are those in which the adjudicator has been the target of personal criticism from the party before him." Appellant's Brief at 19 (emphasis added). The appellant cites three decisions of the Supreme Court. In the first, *Taylor v. Hayes*, 418 U.S. 488, 501-03, 94 S.Ct. 2697, 2704-05 (1974), the Court found in a criminal trial the judge had become "embroiled in a running controversy with" the defendant's counsel, and there was a display of an unfavorable personal attitude toward petitioner, his ability, and his motives, sufficiently so that the issue of whether the attorney was in contempt of court should have been finally adjudicated by another judge. Nothing approaching this kind of situation is alleged here.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 91 S.Ct. 499, 505 (1971), the Court recognized that a judge may become so "personally embroiled" with a lawyer during the trial as to make the judge unfit to sit in judgment on a contempt charge. Such, again, is not the case here. The appellant does not point to any portions of the record that demonstrate any of the arbitrators being biased against it. Other than adverse rulings against it, P&W points to nothing. The alleged error must not be the grounds that the arbitrator's impartiality is challenged. Without demonstrable facts that evidence partiality, the arbitration must be upheld.

Finally, P&W relies on *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975) (*see* brief of the appellant at 19). In rejecting a claim that a combination of investigative and adjudicative functions creates an unconstitutional risk of bias, Justice White tells us there is "a presumption of honesty and integrity in those serving as adjudicators. . . ." *Id.* at 47, 95 S.Ct. at 1464. The Court has found state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941). Nothing rebuts this presumption in this case. Appellant has totally failed to demonstrate evident partiality. P&W was not denied a fair hearing as the result of the panel not knowing in advance the amount of time needed for the proceeding and the panel knowing that P&W was seeking its disqualification. Nor does it appear that personal criticism was directed toward P&W or its counsel in a fashion that displayed partiality. Apparently, there was criticism of both parties, particularly by arbitrator Barge. These arguments must be rejected.

II. *Arbitrators' Failure to Postpone the Hearing*

An arbitration award may be set aside "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . . ." 9 U.S.C. § 10(c). P&W asserts that the hearing should have been postponed because of counsel scheduling conflicts and to allow time for P&W to rebut the so-called Sirrine and Waldron Reports.

1. *Counsel Scheduling Conflicts*

As early as June 13, 1979, the arbitration hearing was tentatively set for September 24 (discovery and prepara-

tion for the hearing had commenced months before). The hearing was held on that date and lead counsel for P&W, Mr. Elliott, was unable to attend until 2:30 that afternoon. P&W was represented by three attorneys at the morning session on September 24. During that time, two Yeargin witnesses were presented. Their cross-examination was delayed until after Mr. Elliott's arrival. He was provided transcripts of their testimony and, the district court found, his cross-examination was adequate and effective. The witnesses had been thoroughly deposed by Mr. Elliott prior to trial. In a complex arbitration, it is difficult to bring the parties, their witnesses, the evidence, and the arbitrators together at once. The fact that attorney Elliott could not be present until 2:30 p.m. was not shown to affect in the slightest degree the outcome of the proceeding. Appellant's attorney was at worst inconvenienced under the circumstances. We cannot say that the failure to postpone the long scheduled hearing was "misconduct."

2. *The Failure of the Panel to Delay the Hearing to Allow P&W an Opportunity to Rebut the Reports of Yeargin's Experts*

The scope of work which Yeargin was to perform was a principal issue between the parties during the arbitration hearing. In order to support its claim that the scope had been broadened, Yeargin commissioned what became known as the Sirrine and Waldron Reports. The reports were voluminous and complex. P&W argues that there was insufficient time to prepare rebuttals to the reports. However, one month before the hearings, P&W was supplied with a 102-page synopsis of the report with 166 exhibits and 8 appendices, including the Sirrine Report. The district court found:

> Up until August 30th the only opposition by P and W to the proposed scheduled hearing on Septem-

> ber 24th was in terms of potential conflicts with other cases and litigation. Up until August 30th, 1979, there was no presentation by P & W of inability to prepare and to present its case at an arbitration proceeding that would commence September 24th, and this is so even though the Sirrine Report was not received until August 24th, and indeed P and W's counsel was on notice that it would not in all likelihood be received until August 24th, that knowledge having occurred really as a result of the July 23rd conference in which there was a setting off of the submission date and a denial of the request for interrogatory information.

Record at 602.

The district judge appropriately dealt with this contention:

> There are many ways of contradicting evidence presented by experts, no one of which certainly is appropriate in all circumstances.
>
> The Court has no difficulty with the position of P and W, that it would have preferred to have at least had a study, one or more made, concerning the Sirrine Report, or the Waldron Report, which was in sufficient detail in effect to have been parallel to it, and showing some glaring errors in logic, or mathematics, or the like, even on the same methodology.
>
> The time for that certainly was not available under the procedures as adopted by the panel. There was, however, time for a modified approach to that, whether in terms of some sampling of results, as well as a critique of basic methodology. And indeed, there was opportunity for the basic presentation of other expert opinions concerning the source of materials relied upon, the basic methodology and approach adopted by Sirrine or by Waldron.

Indeed, as I read through the transcript of the proceedings, there were more than one such witness presented by P and W to the panel whose testimony cast significant doubt on the validity and weight of both of those reports.

It may well have been, and one must surmise from the result of the arbitration proceeding, that such evidence did not sufficiently impress the arbirtators to the point of rejecting the Sirrine Report.

The Waldron Report, it appeared to me, was—close to the words used in the brief filed by P and W—essentially destroyed by his own testimony and by other evidence in the case. It is, of course, not for this Court to decide or to re-decide the merits of the controversy, nor in this am I saying that there could not have been prejudice to P and W in terms of the ultimate result of the arbitration proceedings by not having had the type of report it would like to have had.

It certainly would have had time, however, to have presented someone else's study in written form, such as might duly impress the two engineering types on the arbitration panel, showing in comparison with the Sirrine Report, although not patterned after it and although adopting the approach of other engineering firms, what changes in scope of work were deemed to have occurred and what the economic impact of that was, and likewise in connection with the Waldron Report the effect of scheduling problems and the like.

P&W made the tactical trial decision not to procure its own reports and instead elected to rely on its ability to attack the reports being prepared by Yeargin. P&W was aware that the scope of the work was a crucial issue

during the hearings and had ample time to prepare material to contradict the anticipated report. We agree with the trial judge while P&W attacked the reports through cross-examination and expert witnesses, the panel apparently chose to rely on those reports. We add that the hearing could have been delayed indefinitely by the granting of a series of requests for delay to study opposition reports and prepare counterreports. P&W chose its form of attack and cannot now be granted a second opportunity because it lost. Under the circumstances, the refusal to grant a delay was not misconduct. This is not a basis to set aside the award.

III. *Relationship of Abritrator Morton With Yeargin and Witness Waldron*

Again, P&W relies on the evident partiality provision of 9 U.S.C. § 10(b) to set aside the award. Our review of this issue will require careful consideration of factual findings and interpretation of a Supreme Court plurality opinion.

1. *Arbitrator's Relationship With James Waldron*

James Waldron, an expert on construction scheduling, testified for Yeargin at the arbitration hearing. Arbitrator Morton attended a two-day seminar at which Waldron lectured ten to fifteen years prior to the hearing. Some five years before the hearing, Morton arranged for some employees to attend a seminar conducted specially for them by Waldron. Although Morton mentioned this relationship with Waldron to a fellow arbitrator, it was not revealed to the parties. Morton was a nominee of P&W, which now challenges his impartiality.

P&W asserts that this failure to disclose violates the "per se" rule of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968).

> The petitioner, Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. The contract for painting contained an agreement to arbitrate such controversies. Pursuant to this agreement petitioner appointed one arbitrator, the prime contractor appointed a second, and these two together selected the third arbitrator. This third arbitrator, the supposedly neutral member of the panel, conducted a large business in Puerto Rico, in which he served as an engineering consultant for various people in connection with building construction projects. One of his regular customers in this business was the prime contractor that petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit. An arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made.

393 U.S. 145, 146, 89 S.Ct. 337, 338 (1968).

The Court acknowledged that the third arbitrator was guilty of neither fraud nor actual bias. However, the plurality analogized from cases involving judges, *see, e.g.*,

Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Awards should be set aside when there is "the slightest pecuniary interest."

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

393 U.S. 145, 148-49, 89 S.Ct. 337, 339 (1968).

Thus, the plurality focused upon the appearance of bias as sufficient to reverse an award. The concurring opinion, necessary for a majority, made clear that the standards applicable to Article III judges were not being adopted as governing arbitrators. The concurring opinion limited the broader language used by the plurality to the facts of the case.

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business re-

> lationship with the parties before them if both parties are informed of the relationship in advance, *or if they are unaware of the facts but the relationship is trivial.* I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

393 U.S. 145, 150, 89 S.Ct. 337, 340 (1968) (citation omitted; emphasis supplied) (White, J., concurring).

Commonwealth is distinguishable. The "appearance of bias" that governs disqualifications of judges must be based on facts that would lead a reasonable man to believe that bias is present. Here 9 U.S.C. § 10(b) requires "evident partiality or corruption in the arbitrators, or either of them." The relationship must indicate either personal, financial, or associational ties that would affect the impartiality of the arbitrator. Obviously, not every relationship results in partiality or bias. The district court found that the prior relationship between Waldron and Morton was insufficient to vitiate the arbitration award.

2. *Morton's Association with Yeargin*

Harrison International Corporation was a subcontractor on a portion of a hospital construction job in North Carolina. Robbins Corporation, of which Morton was vice president, was general contractor on the job. Harrison, without participation by Robbins, subcontracted a small portion of its work to Yeargin in October, with work beginning in November. Robbins became aware of the relationship in mid-November. The district judge held it was not clear whether Morton knew of this before the arbitration award was rendered, November 20, 1979. Our review of Morton's testimony reveals strong support for the conclusion that he was unaware of the relationship.

Q. Prior to the time that arbitration was decided, in your opinion, would you have known that Yeargin was a subcontractor on the [Harrison] job?

A. No. In my opinion, I would not have known that.

Q. You're not saying maybe that Robbins didn't know, but you're saying—

A. Right.

Q. —that you personally didn't know?

A. Yes.

The unlikelihood that Morton knew of the relationship coupled with the indirectness of the relationship (Morton's employer's subcontractor on a job employs Yeargin to do some of the work) causes us to conclude that appellant failed to establish "evident partiality."

Combined Effect

Finally P&W argues that the cumulative effect of the actions by the arbitrators require setting the award aside. The arbitrators faced a complex factual dispute involving substantial money. The parties hotly contested the case. Because of the potential award, the parties prepared massive evidence for consideration by the arbitrators. It was clear from the beginning that a tight rein was necessary to keep the proceedings from getting out of hand. The panel was strict, often abrupt, with the parties. The proceedings were pushed along; evidence was trimmed and testimony condensed. Such streamlining of procedures notwithstanding, extensive pretrial conferences were held and a nine-day hearing was conducted yielding 2,756 pages of testimony with additional depositions and 179 exhibits.

On this evidence and with this background, an award was made. We have carefully examined the record and conclude the award was fairly reached without the appearance of bias.

The increasing complexity and cost of litigation has fostered an increase in the use of arbitration. For that tool of dispute resolution to remain viable, proceedings must be kept streamlined enough to ensure participation by capable arbitrators. The decision to arbitrate is a compromise by the parties.

We AFFIRM.

APPLICABLE STATUTES

A. 9 U.S.C. §9: Award of arbitrators; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

B. 9 U.S.C. §10: Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may

make an order vacating the award upon the application of any party to the arbitration -

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

LOCAL RULE 8 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Rev. 8/1/80)

LOCAL CIVIL RULE 8 - ARBITRATION

Sec. 1. *Certification of Arbitrators.*

A. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

B. An individual may be certified to serve as arbitrator if: (1) he has been for at least five years a member of the bar of the highest court of a state or the District of Columbia, (2) he is admitted to practice before this court, and (3) he is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

C. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28, U.S.C.. §453 before serving as an arbitrator.

D. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

Sec. 2. *Compensation and Expenses of Arbitrators.*

The arbitrators shall be compensated $75.00 for services in each case assigned for arbitration. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. Whenever the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated $75.00 for services. The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts.

Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

Sec. 3. *Jurisdiction and Powers of Arbitrators.*

The court shall refer to arbitration any civil action in which the complaint was filed after February 1, 1978, provided:

1. The United States is a party, and:

(A) the action is a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

(B) the action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. §270(b)), the United States has no monetary interest in the claim, and the relief sought:

(i) consists only of monetary damages not in excess of $50,000, exclusive of interest and costs; or

(ii) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; or

2. the United States is not a party, and:

(A) the parties consent to arbitration, the relief sought consists only of money damages, and the parties agree to pay a reasonable fee to the arbitrators; or

(B) (i) the relief sought:

(a) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

(b) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; and

(ii) jurisdiction is based in whole or in part on:

(a) Title 28, U.S.C. §1331 and the action is brought pursuant to Section 20 of the Act of March 4, 1915, as amended (Title 46, U.S.C. §688);

(b) Title 28, U.S.C. §§1331 or 1332 and the action is based on a negotiable instrument or a contract; or

(c) Title 28, U.S.C. §§1332 or 1333 and the action is for personal injury or property damage.

Sec. 4. *Referral to Arbitration.*

(a)(1) Actions subject to arbitration pursuant to this rule shall be referred to arbitration by an order of the judge to whom the case is assigned after a 20 day period from the filing of the answer. The court's order shall set forth the date, time and place of the arbitration hearing and shall designate the arbitrators. In the event that a third party is brought in to the action, this 20 day period shall commence to run from the date of the filing of an answer by the third party. In the event that a party has commenced discovery within the 20 day period, and the court is so notified, the case shall not be referred to arbitration until discovery has been completed or upon expiration of 120 days from the filing of the answer, whichever occurs earlier. In the event that a party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the case shall not be referred to arbitration until the court has ruled on the motion, but the filing

of such a motion after referral shall not stay the arbitration unless the judge so orders.

(2) For the sole purpose of making the determination as to whether the damages are in excess of $50,000, exclusive of interest and costs, as provided in Sections 3(1)(B)(i), 3(1)(B)(ii), 3(2)(B)(i)(a) and 3(2)(B)(i)(b), damages shall be presumed in all cases to be less than $50,000, exclusive of interest and costs, unless counsel of record for the plaintiff at the time of filing the complaint or counsel of record for defendant at the time of filing an answer containing a counterclaim, files with the court a document signed by said counsel which certifies to the best of his knowledge and belief that the damages recoverable exceed the sum of $50,000, exclusive of interest and costs. The court may disregard such certification and require arbitration if satisfied that recoverable damages do not exceed $50,000.

(b) The arbitration shall be conducted before a panel of three arbitrators, one of whom shall be designated as chairman of the panel, unless the parties agree to have it conducted by a single arbitrator. The parties may by agreement select any person or persons to conduct the arbitration. If, within seven days after the action has been referred to arbitration, the parties have not notified the Clerk of the Court that they have made such a selection, the arbitrator or arbitrators shall be chosen by the Clerk by a process of random selection from among the persons certified as arbitrators by the court.

(c) A person selected to be an arbitrator shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. §144 and shall disqualify himself in any action in which he would be required under Title 28, U.S.C. §455 to disqualify himself if he were a justice, judge, magistrate or referee in bankruptcy.

Sec. 5. *Arbitration Hearing.*

(a) The deputy clerk for arbitration shall telephone the arbitrators and the attorneys for the parties in an effort to ascertain an agreeable time and date for the arbitration hearing and he shall recommend such time and date to the judge for inclusion in the order.

(b) The arbitration hearing shall take place in accordance with the date, time and place set forth in the order of the court. The arbitrators are, however, authorized to change the date and time of the arbitration hearing provided the hearing is commenced within 30 days of the hearing date set forth in the order. Continuances beyond this 30 day period must be approved by the judge to whom the case has been assigned. The arbitration hearing shall be concluded promptly.

(c) The deputy clerk for arbitration shall give notice of the hearing to all parties at least 25 days prior to the date set for the hearing.

(d) The arbitration may proceed in the absence of any party who, after due notice, fails to be present, but an award of damages shall not be based solely upon the absence of a party.

(e) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter. Testimony at an arbitration hearing shall be under oath or affirmation.

(f) The Federal Rules of Evidence shall be used as guides to admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten days prior to the hearing and

the arbitrators shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered to the adverse party, as provided herein.

(g) A party may have a recording and transcript made of the arbitration hearing at his expense.

Sec. 6. *Arbitration Award and Judgment*

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial *de novo* pursuant to Section 7 has expired, unless a party demands a trial *de novo* before the court pursuant to that section. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

Sec. 7. *Trial De Novo*

(a) Within twenty days after the filing of the arbitration award with the court, any party may demand a trial *de novo* in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties.

(b) Upon a demand for a trial *de novo*, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial *de novo* the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial *de novo*.

(d) If the party who demanded a trial *de novo* fails to obtain a judgment in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the amount of the arbitration fees.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI upon counsel for all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Mr. Roland Nachman, Jr.
Suite 809
First Alabama Bank Building
Montgomery, Alabama 36101

Mr. O. G. Calhoun
Haynsworth, Perry, Bryant,
Marion & Johnstone
Suite 409, East North Street
Greenville, South Carolina 29602
This 22nd day of November, 1982.

FRANK C. JONES